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CITATIONS

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In the Supreme Court of the United States

OCTOBER TERM, 1946

No. 1094

ELIZABETH ARDEN, INC., ELIZABETH ARDEN SALES CORPORATION AND FLORENCE N. LEWIS, PETITIONERS,

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

OPINIONS BELOW

The findings of fact, conclusions of law, and order of the Federal Trade Commission (R. 9–26) are not yet reported. The opinion of the Circuit Court of Appeals (R. 92–97) is reported in 156 F. 2d 132.

JURISDICTION

The decree of the Circuit Court of Appeals (R. 97–98) was entered on December 5, 1946. The petition for a writ of certiorari was filed on March 4, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial

Code, as amended by the Act of February 13, 1925, which is made applicable by Section 11 of the Clayton Act, as amended (15 U. S. C. 21).

QUESTIONS PRESENTED

1. Whether Section 2 (e) of the Clayton Act, as amended by the Robinson-Patman Act, prohibits a vendor of cosmetics from conditioning the furnishing or the contributing to the furnishing of so-called demonstrator service to purchasers upon terms which the vendor knows only 10 percent of its purchasers can meet, and prohibits such a vendor from refusing to furnish or contribute to the furnishing of demonstrator service upon proportionally equal terms to the remaining 90 percent of its customers.

2. Whether Section 2 (e), which is not specifically limited in its application to persons engaged in interstate and foreign commerce, should be so construed in order to effectuate the clear intention of Congress and sustain the constitutionality of the Section.

3. Whether, in the context of a statute prohibiting discrimination in the terms on which a service is furnished to vendees, a requirement that the service be furnished to all vendees "on proportionally equal terms" furnishes a sufficiently definite standard to satisfy constitutional requirements.

4. Whether the provisions of Section 2 (a), prohibiting only discriminations which may have an adverse effect upon competition, should be

read into Section 2 (e) so as to require a charge and a finding that the practice enjoined may have such an effect.

STATUTE INVOLVED

The pertinent provisions of the Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, as amended by the Robinson-Patman Act of June 19, 1936, c. 592, 49 Stat. 1526 (15 U. S. C. 13) are set forth in the Appendix, *infra*, pp. 15–18.

STATEMENT

In a proceeding under Section 5 of the Federal Trade Commission Act and Section 11 of the Clayton Act, the Commission made findings of fact, now unchallenged (Pet. 5), which may be summarized as follows:

Petitioners are engaged in the manufacture and sale in interstate commerce of various cosmetic and toilet products known as the Elizabeth Arden line. The Elizabeth Arden products are a "prestige" line and petitioners select their customers with a view to enhancing and maintaining this prestige. Petitioners sell their products to 725 department stores, 25 specialty shops and 2250 drugstores. (R. 12.)

For many years, petitioners have furnished or contributed to the furnishing of retail salesgirls commonly, though incorrectly, designated as "demonstrators", to a few of their customers (R. 12). Petitioners sometimes send demonstrators

to stores where they are to be stationed and sometimes select and train girls who are already sales employees of the stores in question; but in either instance, such girls are skilled in presenting to the public the uses and advantages of the petitioners' products (R. 12–13). These demonstrators are actually under the immediate direction of the store where they work, but their duties are primarily, although not exclusively, the sale of Elizabeth Arden products. If a customer asks specifically for the product of another manufacturer the demonstrator will sell it. The demonstrator makes herself generally useful in the cosmetic department of the store insofar as she can do so without neglecting her principal business of promoting the sale of, and selling, Elizabeth Arden products. (R. 13.) Petitioners pay the full salary of some of the demonstrators and pay only part, usually one-half, of the salaries of other demonstrators. Petitioners sometimes make salary payments directly to their demonstrators but, more frequently, the stores in which they work pay their weekly salaries and are reimbursed by petitioners. In some instances, a commission, based upon a specified percentage of the invoice value of the purchased products, is paid to the store with the understanding that it be applied to the salary of the demonstrator. Petitioners sometimes pay a small commission to their demonstrators on sales made in excess of some fixed weekly sales quota. (R. 13.)

As petitioners knew when they established their requirements for furnishing demonstrator service, the requirements are such that less than ten percent of their customers can comply, and their smaller customers are excluded from the opportunity of securing such services on a proportional basis or in any degree whatever (R. 17, 18, 19). They have not informed their customers generally of the demonstrator service which they furnish or the terms upon which it will be furnished (R. 18).

Petitioners' terms for furnishing demonstrator service are not fixed and definite. Each agreement for such services is negotiated upon an individual basis, with petitioners seeking as much as they can secure and making the final determination by deciding whether the aggregate of the "cooperation" that they can secure makes it a desirable transaction from their standpoint. Actual performance among customers varies widely. In some instances, customers who receive demonstrators are not aware of any requirements placed upon them. (R. 16.)

At least 22 customers have two or three demonstrators in one store and other customers have demonstrators in more than one store (R. 13, 16, 17). Petitioners also furnish about 80 partially paid demonstrators to customers and pay commissions to about 82 stores as a contribution to the compensation of the girls selling petitioners' products (R. 16). Petitioners have other customers who desire demonstrator service but to whom such

service is not accorded upon any basis (R. 17). Some of these customers compete with those to whom petitioners furnish demonstrator service (R. 17–18).

Petitioners claimed, but did not establish, that the demonstrator services furnished by them were supplied in good faith to meet the actions of a competitor or competitors (R. 20, 23). Petitioners have not pursued a "no demonstrator" policy from which occasional exceptions were made to meet the actions of a competitor. On the contrary, they have pursued a demonstrator policy intended to beat competition where possible, and formulated and executed for the broad purpose of promoting their general interests without special references to specific demonstrator competition in particular accounts. The policy has been aggressive rather than defensive. (R. 22–23.)

The Commission concluded and found that petitioners have, in the course of interstate commerce, discriminated as among competing purchasers of their products by furnishing or contributing to the furnishing of services or facilities to some of their customers of material value in the handling, sale or offering for sale of products purchased from the petitioners, and have concurrently failed to accord competing purchasers of their products such services or facilities on proportionally equal terms or upon any terms whatever (R. 23). Concluding that the acts and practices of petitioners constituted a violation of Section 2 (e) of the

Clayton Act (R. 23), the Commission entered a cease and desist order (R. 24–26) enjoining the petitioners from discriminating directly or indirectly among competing purchasers:

> 1. By furnishing or contributing to the furnishing of demonstrator service to any retailer purchasing their products when such services are not accorded on proportionally equal terms to other retailer purchasers located in the same city, or other retailer purchasers who in fact resell such products in competition with retailers who receive such services.
>
> 2. By furnishing or contributing to the furnishing of any services or facilities connected with the handling, sale, or offering for sale of products purchased from [petitioners] to any retailer upon terms not accorded to competing retailers on proportionally equal terms.

Upon review proceedings brought in the Circuit Court of Appeals for the Second Circuit, the Commission's order was unanimously enforced (R. 92–98).

ARGUMENT

1. Petitioners contend that there is presented the question of whether Section 2 (e) requires them to furnish demonstrator service to all customers on proportionally equal terms when such service cannot, they say, be proportionalized (Pet. 9). This question was not raised in, or considered by, the court below (R. 5–6, 92–97), and

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does not, therefore, furnish a reason for granting the writ. *Burnet* v. *Commonwealth Imp. Co.* 287 U. S. 415, 417–418; cf. *McCullough* v. *Kammerer Corp.*, 323 U. S. 327, 328. Moreover, petitioners do not claim that the decision of the Commission on this point (R. 19) is in conflict with any decision of this or any other court.

In any event, the decision is clearly correct. The Commission found that petitioners had knowingly tailored the terms under which they furnish or contribute to the furnishing of demonstrators to exclude more than 90 percent of their customers; it also found that petitioners refuse to furnish or contribute to the furnishing of demonstrators to the excluded customers upon proportionally equal terms or upon any terms whatever. This refusal is proscribed by the plain language of Section 2 (e), which makes it unlawful to discriminate among purchasers by furnishing services or facilities upon terms not accorded "to all purchasers on proportionally equal terms." That this is so is made plain by the relevant Committee Reports. The reports in both Houses show that the requirement of proportional equality in the complementary sub-sections (d) and (e) was "designed to prevent the limitation of such allowances to single customers on the ground that they alone can furnish the services or facilities or other consideration in the quantity specified." (S. Rep. No. 1502, 74th Cong. 2nd Sess. p. 8; H. Rep.

No. 2287, 74th Cong. 2nd Sess. p. 16). Cf. *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726, 744–745.

Petitioners contend, however, that unless the coverage of Section 2 (e) is restricted, by construing the phrase "to all purchasers upon proportionally equal terms" to mean "to all purchasers within a selected group upon proportionally equal terms", its effect is to prohibit the furnishing of services when either the service furnished or the terms on which the service is furnished cannot be proportionalized for all purchasers. Since petitioners have made no attempt to comply with the requirements of Section 2 (e), there is no basis for assuming that compliance is impossible. But assuming, purely *arguendo,* that petitioners cannot proportionalize the demonstrator service by varying the percentage of salary paid or otherwise, we think it clear that Congress intended to prohibit the furnishing of a demonstrator to any purchaser. Section 2 (e) specifically applies to "any service or facilities" furnished to a purchaser. If this provision is construed to exclude demonstrator service, it will not reach discriminations seriously injurious to both competing purchasers and manufacturers. Petitioners claim that the leading cosmetic manufacturers use the demonstrator system (Pet. 15) as a major competitive practice (Pet. 24), and that its elimination "will affect the very backbone

of the industry since petitioners and their leading competitors find the use of demonstrators a vital, important practice without which their very business is threatened" (Pet. 16). Since the demand for cosmetics is not unlimited, this can only mean that the elimination of the demonstrator system will enable competitors (who do not use the system because of its cost or otherwise) to obtain a larger share of the available market. Restricting the all-inclusive language of the Section to protect from competition a market position admittedly acquired and maintained by discrimination among competing purchasers is clearly inconsistent with the purpose of the Robinson-Patman Act to eliminate the use of discriminatory practices which may injuriously affect competition. The Commission's interpretation of Section 2 (e) was approved in *Elizabeth Arden Sales Corp.* v. *Gus Blass,* 150 F. 2d 988, 994–995 (C. C. A. 8), certiorari denied, 326 U. S. 773.

2. The contention that Section 2 (e) is unconstitutional because not expressly limited in its application to persons engaged in interstate commerce, is without substance in view of the clear Congressional intention to regulate only such commerce. The Clayton Act was enacted to supplement existing antitrust laws (38 Stat. 730) such as the Sherman Act (26 Stat. 209) which were expressly limited in their application to interstate and foreign commerce. Except for

Section 2 (e), each section of the Clayton Act is expressly limited in its application to such commerce. Each subsection of Section 2, other than subsection (e), is similarly restricted. Among these subsections is subsection (d), which is the complement of subsection (e) and deals with the converse facet of the same problem. H. Rep. No. 2287, 74th Cong, 2d Sess., p. 16; 80 Cong. Rec. 6281; *Elizabeth Arden Sales Corp.* v. *Gus Blass, supra,* p. 993. As this Court has held, a statute will be construed to avoid unconstitutionality when there is a clear Congressional intention to confine the statute to matters within the regulatory powers of Congress. *United States* v. *Walter,* 263 U. S. 15, 17–18.

There is no conflict of authority. The only previous decision on this point was in the *Blass* case, *supra,* in which the Circuit Court of Appeals for the Eighth Circuit decided adversely to petitioners' contention.[1] The cases cited by petitioners as in conflict (Pet. 18) are cases in which the Court did not find a Congressional intention to confine the application of the statute to matters within the regulatory powers of Congress

3. Petitioners contend that the phrase "proportionally equal terms" is so vague and indefinite

[1] The present question was not presented in *Corn Products Refining Co.* v. *Federal Trade Commission,* 324 U. S. 726. The petitioner there conceded that the section "should be construed as applying only to interstate transactions." (Br. 83.)

as to delegate legislative authority and deny due process of law because of the failure of Congress to specify the type of terms permitted and the relative weight to be given each. This contention is based upon an erroneous construction of the Section. Neither to the Commission nor the courts is the task of determining what terms may or may not be imposed delegated. The only function delegated to them is to determine if proportional equality in services and terms exists; and this is the only determination which petitioners must make. The services and the terms upon which they may be furnished are left to the vendor, subject only to the restriction implicit in the provisions of the Section that the service and terms be capable of proportionalization. The cases cited as in conflict do not support petitioners' position. They deal generally with the necessity for a definite standard or for a standard which does not require recourse to facts beyond the ready ascertainment of those upon whom an obligation is imposed. In the context of the anti-discrimination statute of which Section 2 (e) is a part, and in the light of the narrowness of the determination required of vendors, the standard of proportionate equality meets constitutional requirements.

4. The contention that the provisions of Section 2 (a), prohibiting only those discriminations which may have an adverse effect upon competition, should be read into Section 2 (e) so as to

require a specific charge and finding that a practice enjoined under section 2 (e) may have such an effect, conflicts with the intention of Congress. The obvious purpose of Section 2 is not only to forbid all price discriminations which may injuriously affect competition except those specifically permitted by sub-section (a), but also to forbid absolutely the trade practices specified in sub-sections (c), (d) and (e), which were deemed by Congress to be intrinsically unfair and *per se* injurious to commerce. *Biddle Purchasing Co.* v. *Federal Trade Commission,* 96 F. 2d 687 (C. C. A. 2), certiorari denied, 305 U. S. 634; *Oliver Brothers* v. *Federal Trade Commission,* 102 F. 2d 763, 766–769 (C. C. A. 4); *Great Atlantic and Pacific Tea Co.* v. *Federal Trade Commission,* 106 F. 2d 667, 673–678 (C. C. A. 3), certiorari denied, 308 U. S. 625; *Webb-Crawford Co.* v. *Federal Trade Commission,* 109 F. 2d 268, 270 (C. C. A. 5); *Southgate Brokerage Co.* v. *Federal Trade Commission,* 150 F. 2d 607, 609–610 (C. C. A. 4), certiorari denied, 326 U. S. 774. If petitioners' argument should be accepted, sub-sections (c), (d) and (e) would be rendered virtually meaningless since the specified trade practices could be carried out despite the prohibitions unless they were found to result in price discriminations already prohibited by sub-section (a). So construed, these sub-sections add nothing to the section. The lower courts in the cases cited, *supra,* have uniformly refused

so to emasculate subsections (c), (d) and (e). See also *Corn Products Refining Co.* v. *Federal Trade Commission,* 144 F. 2d 211, 219 (C. C. A. 7), affirmed, 324 U. S. 726.

CONCLUSION

The decision below is correct and there is no conflict. It is, therefore, respectfully submitted that the petition for a writ of certiorari should be denied.

GEORGE T. WASHINGTON,
Acting Solicitor General.
WENDELL BERGE,
Assistant Attorney General.
HERBERT BORKLAND,
Special Assistant to the Attorney General.
W. T. KELLEY,
Chief Counsel,
Federal Trade Comission.

MARCH, 1947.

APPENDIX

The Clayton Act of October 15, 1914, c. 323, 38 Stat. 730, as amended by the Robinson-Patman Act of June 19, 1936, c. 592, 49 Stat. 1526 (15 U. S. C. 13) provides in part as follows:

> SEC. 2. (a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided,* That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: *Provided, however,* That the Federal Trade Commission may, after due investigation and hearing

to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: *And provided further,* That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint of trade: *And provided further,* That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

(b) Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services or facilities furnished, the burden of rebutting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section, and unless justification shall be affirmatively shown, the Commission is authorized to issue an order terminating the discrimination: *Provided, however,* That nothing herein contained shall prevent a seller rebutting the prima-facie case

thus made by showing that his lower price or the furnishing of services or facilities to any purchaser or purchasers was made in good faith to meet an equally low price of a competitor, or the services or facilities furnished by a competitor.

(c) It shall be unlawful for any person engaged in commerce, in the course of such commerce, to pay or grant, or to receive or accept, anything of value as a commission, brokerage, or other compensation, or any allowance or discount in lieu thereof, except for services rendered in connection with the sale or purchase of goods, wares, or merchandise, either to the other party to such transaction or to an agent, representative, or other intermediary therein where such intermediary is acting in fact for or in behalf, or is subject to the direct or indirect control, of any party to such transaction other than the person by whom such compensation is so granted or paid.

(d) It shall be unlawful for any person engaged in commerce to pay or contract for the payment of anything of value to or for the benefit of a customer of such person in the course of such commerce as compensation or in consideration for any services or facilities furnished by or through such customer in connection with the processing, handling, sale, or offering for sale of any products or commodities manufactured, sold, or offered for sale by such person, unless such payment or consideration is available on proportionally equal terms to all other customers competing in the distribution of such products or commodities.

(e) It shall be unlawful for any person to discriminate in favor of one purchaser against another purchaser or purchasers of a commodity bought for resale, with or

without processing, by contracting to furnish or furnishing, or by contributing to the furnishing of, any services or facilities connected with the processing, handling, sale, or offering for sale of such commodity so purchased upon terms not accorded to all purchasers on proportionally equal terms.

(f) That it shall be unlawful for any person engaged in commerce, in the course of such commerce, knowingly to induce or receive a discrimination in price which is prohibited by this section.

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